

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

Part A—Commentary

5.13 Waiver of Right to Counsel

Insert the following case summary before the last paragraph on page 19:

A defendant's refusal to cooperate with his appointed counsel and his unequivocal request to be provided with a different defense attorney at trial does not constitute a waiver of counsel or operate as the defendant's request to proceed in propria persona where the record shows that "[the] defendant clearly and unequivocally declined self-representation." *People v Russell*, ___ Mich ___, ___ (2004).

In *Russell*, the defendant informed the trial court at the beginning of trial that he wanted the trial court to appoint a substitute for the defendant's *second* court-appointed attorney. The court refused to appoint different counsel unless the defendant offered "some valid reason" other than "personality difficulties" to justify the appointment of a third defense attorney. The defendant failed to provide any such explanation, and the court explained to the defendant his options: (1) the defendant could retain the counsel of his choice; (2) the defendant could continue with the present attorney's representation; (3) the defendant could represent himself without any legal assistance; or (4) the defendant could represent himself with the assistance of his present attorney. The defendant continued to express his dissatisfaction with his present attorney's defense at the same time that he clearly indicated that he did not wish to conduct his own defense, that he "needed" to be provided with "competent counsel." *Russell, supra*, ___ Mich at ___.

The *Russell* Court reaffirmed the "requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself" as set forth in *Faretta v California*, 422 US 806 (1975), and first adopted by the Michigan Supreme Court in *People v Anderson*, 398 Mich 361 (1976). *Russell, supra*, ___ Mich at ___ n 22. Applying those requirements to the facts in *Russell*, the Court concluded:

“In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant’s desire to have substitute counsel appointed.

“While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel. Therefore, it cannot be said, as the Court of Appeals and dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.

“We believe that defendant’s repudiation of self-representation was unmistakable in this case. However, to the degree that defendant’s refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding plaintiff’s desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with [*People v*] *Adkins* [(*After Remand*), 452 Mich 702 (1996)] and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel [footnotes omitted].” *Russell, supra*, ___ Mich at ___.

Insert the following case summary after the last paragraph on page 19:

A defendant may make an unequivocal, knowing, intelligent, and voluntary waiver of his right to counsel even though the defendant’s request to represent himself was prompted by his dissatisfaction with his counsel’s cross-examination of two prosecution witnesses and the trial court denied the defendant’s request to recall the witnesses so that he could question them. *People v Williams*, ___ Mich ___ (2004).

During the trial in *Williams*, the defendant expressed his desire to represent himself and asked to be permitted to question two witnesses who had already been excused. After the trial court clearly advised the defendant that the witnesses would not be recalled and he would not have the opportunity to question them, the defendant stated that he still wished to proceed with self-representation. The defendant then asserted that the witnesses’ testimony at his preliminary examination would rebut the unfavorable testimony given by the witnesses at trial and asked to have their preliminary examination

testimony read at trial. The court denied this request and the defendant's subsequent request to be allowed time to review the preliminary examination transcript himself. Despite the trial court's denial of all his requests, the defendant again expressed an unequivocal desire to represent himself and waive counsel. *Williams, supra*, ___ Mich at ___. According to the Court, "Defendant's unrealistic 'hopes of introducing evidence' in contravention of the court's explicit ruling do not render invalid defendant's unequivocal invocation of his right to self-representation." *Williams, supra*, ___ Mich at ___.

The trial court further complied with the requirements of MCR 6.005 by establishing a record of the defendant's knowing, intelligent, and voluntary waiver of the right to counsel. The trial court determined that the defendant understood the charges against him, was aware of any mandatory minimum sentences associated with conviction of the charges, and knew of the maximum sentences possible for conviction of the charges. The trial court further advised the defendant of the risks involved in his decision to represent himself and again the defendant expressed an unequivocal desire to waive his right to counsel and proceed in propria persona. *Williams, supra*, ___ Mich at ___.

The *Williams* Court acknowledged the circumstances under which the defendant initiated his waiver but noted the defendant's consistent affirmation of this decision in light of the trial court's rulings:

"Although defendant appeared to condition his initial waiver of counsel on the trial court's agreement to allow him to recall and cross-examine two excused witnesses, he subsequently made an intelligent, knowing, and voluntary waiver of his right to counsel after the trial court rejected defendant's request to recall and cross-examine the witnesses." *Williams, supra*, ___ Mich at ___.